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No.

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IN THE

Supreme Court of the United States

October Term, 1981

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

JURISDICTIONAL STATEMENT
STATE CIVIL CASE

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QUESTIONS PRESENTED

Whether the notice provision of the Pennsylvania Real Estate Tax Sale Law is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution because the statute, on its face and as applied herein, fails to require or provide for notice reasonably calculated to apprise a record mortgagee of the pendency of a tax sale which destroys the mortgagee's valuable recorded interest in the property.

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OPINIONS BELOW

The Judgment and Decree of the Supreme Court of Pennsylvania, Eastern District, No. 461, January Term, 1979, filed May 19, 1982, is unaccompanied by any written Opinion. The Opinion of the Commonwealth Court of Pennsylvania, at No. 944, C. D. 1978, filed July 18, 1979, is reported at 44 Pa. Commonwealth Ct. 301, 404 A. 2d 709 (1979). The Opinion accompanying the Final Decree in Equity in the Court of Common Pleas of Lancaster County, Pennsylvania, is reported at 66 Lancaster Law Review 247 (1978). The Adjudication and Decree Nisi in the Court of Common Pleas of Lancaster County, Pennsylvania, is reported at 66 Lancaster Law Review 243 (1978).

JURISDICTION

This is a direct appeal, pursuant to 28 U. S. C. § 1257(2) from the Judgment of the Supreme Court of the Commonwealth of Pennsylvania, entered on May 19, 1982, which dismissed the appeal of First Pennsylvania Bank, N. A. to that Court. The Judgment of the Supreme Court of Pennsylvania sustained the validity of the Pennsylvania Real Estate Tax Law, specifically the notice section of that statute, 72 P. S. § 5860.602, in the face of a challenge by appellant First Pennsylvania Bank, that the Act was repugnant to the Fifth and Fourteenth Amendments to the United States Constitution.

The question of notice under the Fifth and Fourteenth Amendments to the United States Constitution was raised initially in the Complaint in Equity of First Pennsylvania Bank and has been timely raised and preserved at all stages of this litigation. The Chancellor noted in his

Adjudication and Decree Nisi entered on November 10, 1977, that the only issue was whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for notice of a proposed tax sale (which destroys the mortgage) to the mortgagee. The Chancellor expressly concluded that the Pennsylvania Real Estate Tax Sale Law did not violate the Fifth and Fourteenth Amendments to the United States Constitution by failing to require personal notice to a mortgagee. The same issue was considered by the Court of Common Pleas of Lancaster County, Pennsylvania, sitting *en banc*, which dismissed First Pennsylvania's exceptions to the Chancellor's Adjudication and Decree Nisi and entered a Final Decree on February 21, 1978. The constitutional issue was raised on appeal to the Commonwealth Court of Pennsylvania, which affirmed the Chancellor's Adjudication and Decree Nisi and the Opinion and Final Decree of the Court of Common Pleas of Lancaster County. The constitutional issue was raised on appeal to the Pennsylvania Supreme Court, which dismissed First Pennsylvania's appeal, thereby rendering a decision in favor of the validity of the Pennsylvania Real Estate Tax Sale Law, Act of July 7, 1947, P. L. 1368, Act VI § 602, 72 P. S. § 5860.602.

This appeal is being docketed in this Court within ninety (90) days from the entry of the Judgment of the Supreme Court of Pennsylvania, which was entered on May 19, 1982. The Notice of Appeal was filed in the Supreme Court of Pennsylvania on August 6, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the Constitution of the United States, provides in Section I as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

The notice of provision of the Pennsylvania Real Estate Tax Sale Law provides, in relevant part:

> "Prior to any scheduled sale the bureau shall give notice thereof, once a week for three (3) consecutive weeks in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (a) the purposes of such sale, (b) the time of such sale, (c) the place of such sale, (d) the terms of the sale including the approximate upset price, (e) the descriptions of the properties to be sold as stated in the claims entered, each description commencing with '. . . . . .

. . . . . .

Name of Owner

. . . . . .

Description

Where the owner is unknown and has been unknown for a period of not less than ten years, the name of the owner need not be included in such description.

The description may be given in intelligible abbreviations.

Such published notice shall be addressed to the 'owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties.'

In addition to such publications, similar notice of the sale shall also be given by the bureau, at least ten (10) days before the date of the sale, by United States registered mail, personal addressee only, return receipt requested, postage prepaid, to each owner as defined by this act and by posting on the property.

The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the date of sale enters into an agreement with the bureau to pay the taxes in instalments, in the manner provided by this act, and the agreement entered into." 72 P. S. § 5860.602.

Section 609 of the Act provides that certain liens are divested by the tax sale:

"Every such sale shall discharge the lien of every obligation, claim, lien or estate with which said prop-

erty may have or shall become charged, or for which it may become liable, except no such sale shall discharge the lien of any ground rent or mortgage which shall have been recorded before such taxes became liens, and which is or shall be prior to all other liens, except other mortgages and ground rents." 72 P. S. § 5860.609.

STATEMENT OF THE CASE

As security for a promissory note in favor of appellant, First Pennsylvania Bank, N. A., First Pennsylvania recorded a mortgage on real estate in Lancaster County, Pennsylvania on April 25, 1973. The mortgage has not been assigned or satisfied by First Pennsylvania Bank.

First Pennsylvania's note and mortgage have been in default since April 26, 1974. To date, First Pennsylvania Bank has received neither principal nor interest due it under the obligation secured by its mortgage.

The 1972 real estate taxes on the property were not paid by the owner of the property, Bernard DiSabatino. Because the taxes on the property remained unpaid, the Lancaster County Tax Claim Bureau commenced proceedings to sell the real estate to collect the outstanding taxes.

The Tax Claim Bureau Notice of Tax Sale dated August 12, 1974, identified the owner of the property to be sold as Bernard DiSabatino. The property subject to be sold was described as "13 J 13-2-18 LR36006 in Millersville."

The Notices of the tax sale, which were published in local newspapers, complied with § 602 of the statute. "Notices" of the tax sale appeared in two Lancaster County, Pennsylvania, newspapers, the *Lancaster New Era* and the *Intelligences Journal*, once a week for three successive weeks, on September 13, 20 and 27, 1974. On October 11, 1974, "notice" of the tax sale appeared in the Lancaster Law Review.

First Pennsylvania Bank, N. A., owner of a valuable recorded mortgage in the subject real estate, never received notice of the tax sale, nor was First Pennsylvania given any notice in time to exercise any right of redemp-

tion with respect to the property or to move to object the sheriff's distribution.

Lancaster County and the Commonwealth of Pennsylvania had knowledge and notice of First Pennsylvania's recorded mortgage in the property sold at the tax sale. The mortgage, including the name and address of First Pennsylvania as mortgagee, was on file in the County Recorder's Office. Before the property was sold at the tax sale, the Solicitor of the Tax Claim Bureau, who was present at the time, was informed that the property was subject to a mortgage. The property was sold at a tax sale on October 19, 1974, to Della Becker. Della Becker's son, Heywood Becker, as agent for his mother, bid and paid the sum of $854.68, *i.e.*, a sum equal to the upset sale price announced at the tax sale.

The fair market value of the real estate in January, 1976, was approximately $185,000.00. At the time of trial, the property had a fair market value in excess of $185,000.00.

The Lancaster County Tax Claim Bureau, by deed dated and recorded January 25, 1975, conveyed the real estate, which is the subject of this appeal, to Della Becker, free and clear of First Pennsylvania Bank's recorded mortgage, which had been discharged by the sale.

The Pennsylvania Real Estate Tax Sale Law does not provide for or require any notice to a record mortgagee, such as First Pennsylvania. The Chancellor found as a fact that First Pennsylvania never received any personal or mailed notice of the tax sale. Nevertheless, the Real Estate Tax Sale Law provides that a tax sale destroys a mortgagee's interest. 72 P. S. § 5860.609 (1968).

Upon learning that its valuable mortgage had been destroyed by the tax sale, First Pennsylvania promptly filed a Complaint in Equity against the Lancaster County Tax Claim Bureau and Della Becker. First Pennsylvania

claimed that the Pennsylvania Real Estate Tax Sale Law was unconstitutional in that it authorized the taking of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. First Pennsylvania sought a decree which would (1) declare the tax sale held on October 19, 1974, to be invalid and void; (2) cancel and strike the deed from the Lancaster County Tax Claim Bureau to Della Becker dated January 24, 1974; and (3) confirm and reinstate the mortgage lien of First Pennsylvania in the property.

The Honorable Wilson Bucher of the Court of Common Pleas of Lancaster County, Pennsylvania, stated in the Adjudication that the "only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales."

Chancellor Bucher found that the "Pennsylvania Real Estate Tax Sale Act is constitutional and does not offend the Fifth and Fourteenth Amendments to the United States Constitution." Chancellor Bucher found that First Pennsylvania was not denied due process of law in connection with the sale of real estate which resulted in the discharge of its mortgage lien. Chancellor Bucher also found that First Pennsylvania was not entitled to personal or mailed notice of the tax sale.

First Pennsylvania filed exceptions to Judge Bucher's Decree Nisi, specifically addressing the Chancellor's finding that the Pennsylvania Real Estate Tax Sale Law is constitutional. The Court *en banc* affirmed the Chancellor's findings and entered a Final Decree on February 21, 1978.

First Pennsylvania Bank appealed to the Commonwealth Court of Pennsylvania, which affirmed the Final Decree in Equity of the Court of Common Pleas by Order

filed on July 18, 1979. In a one paragraph Opinion, the Honorable Richard DiSalle of the Commonwealth Court stated that the affirmance was "on the basis of Judge Bucher's Adjudication and Decree Nisi dated November 10, 1977, and the Opinion and Final Decree dated February 21, 1978. . . ." First Pennsylvania appealed this case to the Pennsylvania Supreme Court, which, after full briefing and oral argument, dismissed the appeal.

First Pennsylvania's claim that the notice provision of the Pennsylvania Real Estate Tax Sale Law is unconstitutional on its face and as applied, has been raised in timely fashion and has been preserved at every stage of the proceedings below; the issue is properly before this Court for decision.

THE FEDERAL QUESTION IS SUBSTANTIAL

I. Whether the Notice Provision of the Pennsylvania Real Estate Tax Sale Law Is Repugnant to the Fifth and Fourteenth Amendments to the United States Constitution Because the Statute, on Its Face and as Applied Herein, Fails to Require or Provide for Notice Reasonably Calculated to Apprise a Mortgagee of the Pendency of a Tax Sale Which Destroys the Mortgagee's Valuable Recorded Interest in the Property.

A. The Notice Provision of the Pennsylvania Real Estate Tax Sale Statute Fails to Provide or Require Notice to a Record Mortgagee.

The question raised in this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution, because the lower courts have sustained the validity of a statute of the Commonwealth of Pennsylvania which provides for and requires no actual or personal notice of the pendency of a tax sale to the owner of a recorded mortgage, even though the tax sale conducted pursuant to the statute discharges the mortgage lien in the real property which is the subject of the sale. The substantial question which requires the plenary review by this Court is whether the notice provision of the Pennsylvania Real Estate Tax Sale Law is unconstitutional on its face and as applied under the circumstances of this case insofar as the statute omits the requirement of notice reasonably calculated to apprise a mortgagee of the pendency of a tax sale which destroys the mortgagee's valuable interest in real property.

The tax sale at issue in this case was conducted pursuant to the procedures established and governed by the Pennsylvania Real Estate and Tax Sale Law, Act of July 7, 1947, P. L. 1368, No. 542, Act I, § 101, *et seq.*, as amended, 72 P. S. § 5860.101 *et seq.*, which does not pro-

vide for any notice to record mortgagees. The published notice in the local newspapers complied with § 602 of the statute.

The Chancellor found as a fact that First Pennsylvania never received personal or mailed notice of the tax sale. The Chancellor's Adjudication depends upon the constitutionality of the "constructive notice" provided by § 602 of the statute.

Section 602 of the Act provides for three forms of notice of an impending tax sale. Publication in newspapers of general circulation and in the legal journal is addressed to "owners" (as defined in the Act) and "all persons having tax liens, tax judgments or municipal claims against the property described in the notice." The second form of notice, by certified mail, personal addressee only, is given only to "owners" (again, as defined by the Act). The third form of notice, posting on the property, is required to be "similar" to the published notice insofar as the posted notice must be addressed specifically to attract the attention of "owners" and "all persons having tax liens, tax judgments or municipal claims" against the property described in the posted notice.

The Act clearly provides that a tax sale destroys a mortgagee's interest. 72 P. S. § 5860.609 (1968). The Court of Common Pleas of Lancaster County reached the astonishing conclusion, which the Appellate Courts of Pennsylvania affirmed, that First Pennsylvania, a record mortgagee, known to Lancaster County and the Commonwealth of Pennsylvania, was not denied due process, although the tax sale conducted without notice to First Pennsylvania resulted in the destruction of First Pennsylvania's valuable recorded interest in real property. As a practical matter, First Pennsylvania's mortgage constituted the most valuable interest and investment in the property at the time; therefore, the effect of the tax sale

was to destroy the most valuable property interest in the real estate, in the absence of meaningful notice reasonably calculated to apprise the mortgagee of the pendency of the tax sale which destroys the mortgage lien.

B. The Pennsylvania Real Estate Tax Sale Statute, on Its Face and as Applied in This Case, Is Repugnant to the Fifth and Fourteenth Amendments to the United States Constitution by Failing to Provide Reasonable Due Process Notice to a Mortgagee of the Pendency of a Tax Sale.

The legality of the notice provision of the Pennsylvania Real Estate Tax Sale Law must be tested against a well-settled and developed body of constitutional law.

In the seminal "notice" case, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which concerned statutory notice to beneficiaries of a common trust fund of a judicial settlement of accounts, this Court held that statutory notice by publication in a local newspaper failed to provide the beneficiaries with due process required by the Fourteenth Amendment. 339 U. S. at 311. This Court stated:

> "Certainly the proceeding is one in which [the beneficiaries] may be deprived of property rights and hence notice and hearing must measure up to the standards of due process." *Id.*

As this Court explained:

> "The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U. S. 385, 294. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> • • •

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer,* 311 U. S. 457; *Grannis v. Ordean,* 234 U. S. 385; *Priest v. Las Vegas,* 232 U. S. 604; *Roller v. Holly,* 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U. S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' *American Land Co. v. Zeiss,* 219 U. S. 47, 67; and *see Blinn v. Nelson,* 222 U. S. 1, 7.

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defensed on the ground that it is in itself reasonably certain to inform those affected. . . ." 339 U. S. at 314-15.

The Chancellor recognized that First Pennsylvania Bank "never received any personal notice of the tax sale." The Chancellor concluded that the published "notice"

complied with the Fifth and Fourteenth Amendments to the United States Constitution. The Chancellor erroneously misplaced the burden on First Pennsylvania to exercise "modest efforts" to protect its valuable property interest, *i.e.*, "a subscription to the local law review and a perusal of its tax sales notices [which] would have been sufficient to apprise [First Pennsylvania] that [its] security was in jeopardy." This reasoning cannot withstand analysis under the Fifth and Fourteenth Amendments. The burden remains with the state agency to provide reasonable notice of the pendency of the adverse action.

The Chancellor's attempt to justify the deprivation which occurred in this case fails to reconcile the notice provision of the Pennsylvania Real Estate Tax Sale Statute with the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution. The Act, on its face, does not provide for or require notice to mortgagees. First Pennsylvania had no reason to know of the immense premium of protection provided by subscription to local newspapers and the law journal in every county in which it holds a mortgage. There is no such burden, consistent with the Fifth and Fourteenth Amendments, imposed on a mortgagee.

The "notices" here are typical of published notices of tax sales in local newspapers. It is fantastic to equate such "notices" with the "notice" contemplated by the Fifth and Fourteenth Amendments to the United States Constitution, especially when one considers the value of such "notices" to a non-possessory and non-resident mortgagee.

> "Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interest. We have before indicated in reference to notice by

publication that, 'great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.'" 339 U. S. at 320, *citing*, *McDonald v. Mabee*, 243 U. S. 90, 91 (1917).

In *Mullane*, Mr. Justice Jackson wrote:

"It would be idle to pretend that publication alone as prescribed here [by statute], is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspapers' normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." 339 U. S. at 315.

Mullane rejects any contention that notice by publication is reasonable, adequate or constitutional when the name and address of the interested person are known or discoverable with reasonable diligence:

"As to known present beneficiaries [*i.e.*, persons with interests in property against which action is pending] of known place of residence, however, notice by pub-

> lication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. *Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.*" 339 U. S. at 318 (emphasis added).

In *Mullane*, this Court held that where the trustee had the names and addresses of beneficiaries "on its books" there was "no tenable ground for dispensing with a serious effort to inform them personally . . . at least by ordering mail to the record addresses." 339 U. S. at 318. *Cf. Wuchter v. Pizzutti*, 276 U. S. 13 (1928). The Chancellor found as a fact that First Pennsylvania was the owner of a *recorded* mortgage. The mortgage was recorded in the office of the Recorder of Deeds in Lancaster County, Pennsylvania, (*i.e.*, the same office in which the deed to the subject property was recorded). Lancaster County and the Commonwealth of Pennsylvania were given certified, recorded and actual notice of First Pennsylvania's valuable interest in real property. The name and address of First Pennsylvania Bank were readily available. The attorney for the Tax Claim Bureau was informed of the mortgage prior to the sale of the property.

In *Schroeder v. City of New York*, 371 U. S. 208 (1962), the appellant was not notified of condemnation proceedings which had been instituted against her property. This Court held that "newspaper publication and posted notices in the circumstances of this case did not measure up to the quality of notice which the due process clause of the Fourteenth Amendment requires." 371 U. S. at 211. In *Schroeder*, New York law provided that notice

of condemnation proceedings was to be given to affected property owners by publication in newspapers and by posting of handbills in the vicinity of the condemned real estate. Although the appellant's name and address were readily ascertainable from deed records, neither the newspaper publications nor the posted notices contained the *names* of the appellant nor of any affected property-owner. 371 U. S. at 210. This Court held: "The posting of these signs, therefore, did not constitute the personal notice that the rule enunciated in the *Mullane* case required." 371 U. S. at 213.

In this case, the "notices" were not addressed or directed personally to First Pennsylvania. The Act does not require notice to a mortgagee, nor is there any requirement that any notice be addressed to a mortgagee. It is unreasonable to assume that First Pennsylvania would ever see any posted or published notice due to the fact that First Pennsylvania's principal place of business is in Philadelphia, not Lancaster County. The notices in this case were completely ineffectual.

In *Schroeder*, this Court reiterated its view of the "inadequacies of 'notice' by publication." 371 U. S. at 212. This Court cited *New York v. New York, N. H. & H. R. Co.*, 344 U. S. 293, 296 (1953), "where the court pointed out that '[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and that '[i]ts justification is difficult at best.'" 371 U. S. at 213. This Court, in dictum, has held that there is just as much reason to give creditors mailed notice as there is to give mortgagees mailed notice. *See e.g., New York v. New York, N. H. & H. R. Co., supra*, at 296.

In *Curtis v. Redevelopment Authority*, 482 Pa. 58, 393 A. 2d 377 (1978), the Supreme Court of Pennsylvania held that when the record holder of an easement could be identified through the investigation of land and tax

records, any notice short of mailed notice to the easement holder was insufficient and failed to comply with the requirements of due process. 482 Pa. at 64-65, *following Schroeder v. New York, supra*, and *Mullane v. Central Hanover, supra*. In *Curtis*, Justice Robert N. C. Nix, Jr., of the Pennsylvania Supreme Court explained:

> "There was no affirmative burden on appellant to inspect the servient estate in order to be put on notice by the postings. To the contrary, the burden was on the Authority to conduct a search for recorded interests and then to take reasonable steps to notify holders of such recorded interest. To hold otherwise would countenance the practice of the Authority of ignoring the recording system of this jurisdiction." 482 Pa. at 65.

There can be no doubt that First Pennsylvania owned a valuable property interest in the property which was sold at the tax sale in this case. The Chancellor's attempt to restrict due process protection to "owners" must be viewed in light of *Mullane*, which spoke of protection given property interests in a generic sense. *See also, North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U. S. 601, 608 (1965) (this Court eschewed any difference in due process protection based on a distinction between various forms of property interests. "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the due process clause."). *Fuentes v. Shevin*, 407 U. S. 67, 89-90 (1972) (rejecting differences in due process protection based on the type of property concerned).

Moreover, this Court may take judicial notice that most commercial property today is acquired by third-party financing where the owners and mortgagees of the

property often live far removed from the property itself. Providing written notice to the mortgagee of record would serve and not frustrate the underlying purpose of the creation of a municipal agency charged with the responsibility for collecting unpaid taxes. The purpose of the Real Estate Tax Sale Law is, of course, to collect taxes and not to conduct tax sales for the purpose of destroying valuable property rights and at the same time providing windfalls to the speculators who attend such sales. Requiring a taxing authority to provide actual or personal notice of a pending tax sale to mortgagees of record would further the bona fide state interest in collecting real estate taxes. In many instances, such as the case at hand, it is the financial institution holding the mortgage which has the most significant interest in the real estate and is in the best financial position to pay the taxes rather than risk the loss of its investment. There should be little doubt that had First Pennsylvania received notice of the impending tax sale, the taxes would have been paid and First Pennsylvania would not have lost its mortgage interest in property valued at approximately $185,000.00.

The mere fact that First Pennsylvania may have received notice of a tax lien or that First Pennsylvania's lien was junior to the tax lien does not remove the due process requirement of notice of the actual pendency of the tax sale proceeding. Notice of the possibility of state action is not coterminous with notice of the actual pendency of the adverse state action. *Mullane* requires notice "that the matter is pending. . . ." 339 U. S. at 314. *See e.g., Fuentes v. Shevin*, 407 U. S. 67 (1972) (purchasers, who signed installment sales contracts for goods, under which contracts the seller retained title and was given the right to repossess the goods upon the purchaser's default, were entitled to prior notice and an opportunity

to be heard before state authorized agents could repossess and seize the goods; certainly, in *Fuentes*, the purchaser had notice of the claim of the seller; nevertheless, *Fuentes* clearly requires notice of the actual pendency of the adverse government action).

A trial court in Berks County, Pennsylvania, recently held that a judgment creditor of the owner of property who had a junior lien against property sold at a tax sale, was denied due process of law, although the published notice complied with § 602 of the statute. *In re: Upset Sale, Tax Claim Bureau of Berks County, Pennsylvania*, No. 361 October, 1979, A. D., No. 800 October, 1979, J. D. (Berks County, Pa., Opinion filed July 16, 1982) (A copy of the trial court's written Opinion is set forth in full at the Appendix hereto). The judgment creditor argued that the statute was unconstitutional insofar as it deprived junior lien creditors of notice and deprives them of a valuable property right, *i.e.*, their liens, without due process of law. The Berks County Court agreed, finding § 602 of the Act to be unconstitutional.

The Chancellor's decision in this case, which was ultimately affirmed by the Pennsylvania Supreme Court, runs afoul of the line of decisions from this Court requiring notice reasonably calculated under all the circumstances to apprise the owner of a property interest of the pendency of proceedings which will adversely affect his interest so as to require more than mere published notice in a local weekly newspaper.

Finally, a review of the lower court's opinions and decisions set forth in the Appendix hereto should demonstrate that no adequate or independent state law grounds exist to support the judgment. Indeed, the Chancellor limited his discussion to only one issue: whether the notice provided by the Pennsylvania Real Estate Tax Sale Law comports with due process. It does not.

II. Conclusion

The judgment of the Supreme Court of Pennsylvania, which sustained the validity of the Pennsylvania Real Estate Tax Sale Law notice provision in the face of First Pennsylvania Bank's challenge that the notice provision is repugnant to the Fifth and Fourteenth Amendments to the United States Constitution should be reversed and vacated. The notice provision, on its face, and as applied under the circumstances of this case, violates federal constitutional requirements of notice reasonably calculated under all the circumstances to apprise a mortgagee of the actual pendency of a tax sale which discharges the mortgage lien. This appeal should be granted plenary review because the federal question posed is substantial and there are no adequate and independent state law grounds supporting the judgment of the Supreme Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

RICHARD M. SHUSTERMAN
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Attorneys for Appellant

Of Counsel:
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IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,

Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU and DELLA BECKER

Appeal from Decree of Commonwealth Court entered July 18, 1979, at No. 944 C.D. 1978, Affirming Final Decree in Equity of Court of Common Pleas of Lancaster County, Civil Action—Equity, at No. 16 Equity Docket, Page 242

ARGUED: April 20, 1982

DECREE

PER CURIAM FILED: MAY 19, 1982

Appeal dismissed as having been improvidently granted.

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 944 C.D. 1978

FIRST PENNSYLVANIA BANK N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU AND DELLA BECKER,
Appellees

BEFORE:

HONORABLE ROY WILKINSON, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE RICHARD DISALLE, *Judge*

ARGUED: March 8, 1979—Harrisburg

OPINION

OPINION BY JUDGE DISALLE FILED: JULY 18, 1979

This is an appeal from the final decree in equity of the Court of Common Pleas of Lancaster County which affirmed the Chancellor's adjudication and decree nisi dismissing the complaint filed by the First Pennsylvania Bank N.A. In so doing, the Chancellor refused to set aside the disputed tax sale and held the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S.

§ 5860.101 et seq., to be constitutional. We affirm on the basis of Judge Bucher's Adjudication and Decree Nisi dated November 10, 1977, and the Opinion and Final Decree dated February 21, 1978, at Equity Docket No. 16, Page 242.

/s/ RICHARD DISALLE
Richard DiSalle, Judge

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

No. 944 C.D. 1978

FIRST PENNSYLVANIA BANK N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU
AND DELLA BECKER,
Appellees

ORDER

AND Now, this 18th day of July, 1979, the final decree in equity of the Court of Common Pleas, dated February 21, 1978, is hereby affirmed.

/s/ RICHARD DISALLE
Richard DiSalle, Judge

FINAL DECREE OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY CIVIL—EQUITY

FIRST PENNSYLVANIA BANK

v.

LANCASTER COUNTY TAX CLAIM BUREAU

Saul, Ewing Remick & Saul, for Exceptions.

Herr, Kirchner, Greer & Herr and Maurice M. Green, contra.

OPINION BY BUCHER, J., FEBRUARY 21, 1978.

The matter before the court en banc concerns exceptions filed by plaintiff and defendant, Della Becker, to an adjudication and decree nisi by the Chancellor which dismissed plaintiff's complaint. Defendant's exceptions go mainly to the Chancellor's failure to make certain findings of fact and conclusions of law. Plaintiff's exceptions go to the Chancellor's finding that the Pennsylvania Real Estate Tax Sale Law is constitutional and his failure to find that equitable considerations compel the setting aside of the tax sale.

We affirm the Chancellor's adjudication. His finding that the Pennsylvania Real Estate Tax Sale Law is constitutional has received recent support in an opinion by Judge Newcomer of the District Court for the Eastern District of Pennsylvania in the case of *First Pennsylvania Bank N. A. v. Country Investment Corp.*, Civil Action No. 76-3401, the opinion being dated January 4, 1978.

Nor do we find that equitable considerations require the setting aside of the tax sale. Concerning this aspect of the case we make the following additional findings of fact for the assistance it may give to a reviewing court:

ADDITIONAL FINDINGS OF FACT

16. Both tracts of land referred to in findings of fact 11 and 12 were assessed in the name of Bernard DiSabatino.

17. Bernard DiSabatino was the corporate nominee of Lynnebrook Apartments, Inc., as set forth in an instrument recorded February 28, 1972, in the Recorder's Office of Lancaster County in Deed Book C, Volume 62 at Page 48.

18. Attorney Frank O'Donnell (O'Donnell) represented both Bernard DiSabatino and St. Paul Title Insurance Co. at the mortgage closing referred to in finding of fact number 7.

19. Prior to the mortgage settlement Bernard DiSabatino personally handed O'Donnell tax bills (for the Lynnebrook Apartments, Inc., property) which O'Donnell paid believing he was paying the taxes on the property which is the subject of this suit.

20. The receipts for said tax payments referred to in finding of fact number 19 indicated the map number for the Lynnebrook Apartments, Inc., property and not for the subject property.

21. O'Donnell never inquired as to the title designation of the property referred to in the tax receipts.

22. In all of the communications between O'Donnell and the taxing authorities O'Donnell indicated he intended to pay taxes "for Bernard DiSabatino" without identifying the property by description and map number.

The findings of the Chancellor and the additional findings of the Court en banc suggest that two factors contributed to the misallocation of attorney O'Donnell's tax payment; i.e., (a) the failure of the Tax Claim Bureau

to have the Lynnebrook property listed in its (Lynnebrook's) own name rather than DiSabatino's and (b) the failure of attorney O'Donnell to make certain that his tax payment was being applied to the property described in the mortgage. The plaintiff, mortgagee, and the defendant purchaser being equally innocent parties the loss must be borne by the party on whom it has fallen. As between two parties having equal equities, the holder of the legal title prevails. *Linwood Harvestore, Inc. v. Cannon,* 427 Pa. 434.

Since plaintiff is arguing the equities of the case in its favor, including the inadequacy of price, we conclude that the following additional findings of fact are indicated:

ADDITIONAL FINDINGS OF FACT

23. The $1,100,000 loan by plaintiff to Bernard DiSabatino, secured by the mortgage discharged by the tax sale, was secured by a total of five mortgages, each in the amount of $1,100,000 on properties owned by DiSabatino in Lancaster County (the subject mortgage) and four other counties in Pennsylvania.

24. The $1,100,000 mortgage on the Millersville tract in Lancaster County (the subject mortgage) could have been released upon payment to plaintiff of $76,500.00.

25. The office of O'Donnell, Hughes and Lowicki, attorneys, acting as agent for Bernard DiSabatino and the St. Paul Title Insurance Company were on notice that the tax bills they were paying, being the ones handed to O'Donnell by Bernard DiSabatino, were the taxes on the tract designated under 13-J13-2-19.

26. The Tax Claim Bureau of Lancaster County had no notice or knowledge of the lien, junior to the tax claim

lien, held by First Pennsylvania Bank N. A., nor had any consideration passed between the Tax Claim Bureau and the First Pennsylvania Bank N. A. that might have placed an obligation on the Tax Claim Bureau to give First Pennsylvania Bank N. A. personal notice of the tax sale.

FINAL DECREE

And now, February 21, 1978, plaintiff's exceptions to the Chancellor's adjudication and decree nisi are dismissed except as to exception number 9 which is sustained in the following respects; i.e., plaintiff's request for findings of fact, numbers 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 25, are adopted as additional findings of fact by the Court en banc and are incorporated herein by reference. Defendant, Della Becker's exceptions are dismissed except as follows: exception number 1 is sustained and is adopted as additional finding of fact number 16; exception number 2 is sustained and is adopted as additional findings of fact numbers 18 and 19; exception number 3 is sustained and is adopted as additional finding of fact number 23; exception number 4 is sustained and is adopted as additional finding of fact number 24; exception number 5 is sustained and is adopted as additional finding of fact number 25; exception number 7 is sustained and is adopted as additional finding of fact number 26; exception number 12 is sustained, as modified by adding the word "alone" after the last word in the paragraph. Exception number 12, as modified, is incorporated herein as additional conclusion of law number 4a.

The Chancellor's adjudication and decree nisi dated November 10, 1977, as modified by the additional findings of fact and conclusion of law is incorporated herein by reference and his decree dismissing plaintiff's complaint is hereby entered as a final decree.

ADJUDICATION AND DECREE NISI OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY CIVIL—EQUITY

FIRST PENNSYLVANIA BANK

v.

LANCASTER COUNTY TAX CLAIM BUREAU

Saul, Ewing, Remick & Saul, for Plaintiff.

Herr, Kirchner, Greer & Herr, and Maurice M. Green, contra.

ADJUDICATION BY BUCHER, J., NOVEMBER 10, 1977.

This is an equity action (a) to set aside a tax sale made pursuant to the Pennsylvania Real Estate Tax Sale Law (72 P.S. 5860.101 et seq.), (b) to cancel the deed to the purchaser, and (c) to reinstate and confirm a first mortgage which was discharged by the tax sale.

ISSUES

(1) Does the Pennsylvania Real Estate Tax Sale violate the 5th and 14th Amendments of the United States Constitution by failing to require personal notice to mortgagees?

(2) Does the Act require personal notice to a mortgagee?

(3) Do equitable considerations require that the sale be set aside?

FACTS

1. Plaintiff First Pennsylvania Bank N.A. is a national banking association organized and existing under and by

virtue of the laws of the United States of America with a place of business at Centre Square, First Pennsylvania Tower, 1500 Market Street, Philadelphia, Pennsylvania. On June 3, 1974, The First Pennsylvania Banking and Trust Company was duly converted, in accordance with law, into a national banking association, the name of which is First Pennsylvania Bank N.A.

2. Defendant Lancaster County Tax Claim Bureau is a Tax Claim Bureau created under the Pennsylvania Real Estate Tax Sale Law of 1947, as amended, (hereinafter called Act) to act as agent of the various taxing districts of Lancaster County including Millersville Borough, County of Lancaster and School District of Lancaster. The Lancaster County Tax Claim Bureau has an office at 45 North Duke Street, Lancaster, Pennsylvania.

3. Defendant Della Becker is an adult individual residing at 49 Old York Road, New Hope, Bucks County, Pennsylvania.

4. The Lancaster County Tax Claim Bureau by its deed dated and recorded January 24, 1975, in the office of Recorder of Deeds of Lancaster County, Pennsylvania, in Deed Book C, Volume 66, Page 386, purported to convey the real estate described therein—namely 16,273 acres of land in Millersville Borough—to Della Becker.

5. The deed described in paragraph 4 above was executed and delivered by the Tax Claim Bureau as a result of a Tax Sale conducted on October 19, 1974, of the property of Bernard DiSabatino for the purpose of collecting real estate taxes allegedly due Millersville Borough, County of Lancaster and School District of Lancaster. The sale was approved by the Court of Common Pleas of Lancaster County as required by law and complied with all notice provisions of the Act.

6. Bernard DiSabatino purchased said real estate from Nathan Loss and Herbert S. Levy, Trustee, by deed dated February 16, 1972, recorded February 28, 1972, in the office of the Recorder of Deeds of Lancaster County in Deed Book C, Volume 62, Page 30.

7. Plaintiff was the mortgagee of a first mortgage on said property, dated April 25, 1973, given by Bernard A. DiSabatino and Joan K. DiSabatino as mortgagors in the principal amount of $1,100,000.00 which was recorded in the office for recording of deeds in Lancaster County in Mortgage Book 998, Page 869, on April 25, 1973.

8. At the Tax Sale referred to in Paragraph 5 above, defendant Della Becker bid and paid $830.08, which was equal to the upset sale price announced at the sale.

9. The fair market value of the real estate at the time of the tax sale was $185,000.00.

10. Plaintiff never received any personal notice of the tax sale.

11. DiSabatino was the sole shareholder of the Lynnebrook Apartments, Inc., which owned a tract of land in Millersville Borough adjacent to the subject property and designated in the Tax Bureau records by Map No. 13J13-19.

12. The real estate sold to Becker at the tax sale had been designated as Map No. 13J13-18.

13. Counsel for DiSabatino in connection with the closing for the loan described in Paragraph 7 above paid certain 1972 taxes on the property titled to Lynnebrook Apartments, Inc., under the mistaken belief that he was paying the taxes on which the subsequent tax sale was based.

14. The mortgage on said property described in Paragraph 7 was junior in lien to the lien of the 1972 real estate taxes on which the tax sale was based.

15. Plaintiff did not file any objections or exceptions to the confirmation nisi of the tax sale pursuant to Section 605(d) of the Tax Sale Law.

DISCUSSION

The only issue deserving extended discussion is whether the Pennsylvania Real Estate Tax Sale Law denies mortgagees due process of law by failing to provide for personal notice of proposed tax sales.

The Act in Section 602 provides for published notice of the sale once a week for three consecutive weeks in two newspapers of general circulation addressed to the "owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties." In Addition, certified mail notice must be given the owner and the property posted. Mortgagees are not owners under the definition set forth in Section 102 of the Act.

The Act further provides for a published notice in a newspaper of general circulation and the legal journal after the confirmation nisi of the sale and allows objections or exceptions to be filed questioning the regularity or legality of the proceeding (72 P.S. 5860.607).

Plaintiff contends that the Act offends the 5th and 14th Amendments of the United States Constitution in failing to provide for mailed notice to the mortgagee.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, it is said that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pending of the action and afford them an opportunity to present their objections."

In *Luskey v. Steffron, Inc.*, 461 Pa. 305, the Pennsylvania Supreme Court struck down Pa. R.C.P. 3129 for its failure to provide for personal notice to *owners*. The Court said: "While this type of notice [posting and newspaper publications] may have been sufficient in the time when the owners of real estate either resided on their real estate or lived in close proximity to it, such is not the situation today."

The question here, by analogy to *Luskey v. Steffron*, is: What changes, if any, have occurred in the relationship between mortgagors and mortgagees which require our holding that notice to a mortgagee must be personal? While absentee owners may require some additional due process protection we fail to see why a mortgagee cannot protect his interest with only modest efforts. In this case a subscription to the local law review and a perusal of its tax sales notices would have been sufficient to apprise the plaintiff that his security was in jeopardy. Mortgagees have always had the obligation to look after their security with respect to insurance, depreciation, waste, taxes, and liens.

Plaintiff cites *Pioneer Savings & Loan Co. v. City of Cleveland*, U.S.D.C., N.D. Ohio, No. C-69-922 for the proposition that a mortgagee must be given personal notice. However, a close reading of that case reveals that the mortgagee did not receive notice of *any* kind.

We do not believe that *First Federal Savings & Loan Assn. v. Swift*, 457 Pa. 206, is authority for the proposition that mortgagee must be given mailed or personal notice. In the course of his opinion Mr. Justice Roberts said that "notice must be given . . ." and then refers to Section 602 of the Act, cited above.

In *Franklin Federal S&L Assn. et al. v. Yocum et al.*, 30 Fayette L.J. 125, it was held that if notice has been

properly given to the owner a mortgagee may not complain that he did not, as agent of the delinquent taxable or property owner, receive notice.

Plaintiff concedes that mere inadequacy of price is an insufficient basis for setting aside the tax sale but contends that defendant Della Becker's son appeared at the sale and announced that the sale was subject to a substantial mortgage. Plaintiff contends that this discouraged active bidding to plaintiff's detriment. We have no basis for finding that any false representation was made by Della Becker's son and, in any event, there is nothing in the record to indicate that any prospective purchaser was deceived by any statement made by him. In short, we find no equitable basis for overturning the sale. Indeed, as Mr. Justice Roberts said in *First Federal S&L Assn. v. Swift*, above, "When the rights of a party are clearly established by defined principles of law, equity should not change or unsettle that right. Equity follows the law."

For the foregoing reasons we believe that the Pennsylvania Real Estate Tax Sale Act is constitutional and does not offend the 5th and 14th Amendments to the United States Constitution.

Conclusions of Law

1. The Pennsylvania Real Estate Tax Sale Act (72 P.S. 5860.101 et seq.) is constitutional.

2. Plaintiff, mortgagee, was not denied due process of law in connection with the sale of real estate which resulted is the discharge of its mortgage lien.

3. Plaintiff was not entitled to personal or mailed notice of the tax sale.

4. There are not equitable considerations which justify setting aside the sale.

5. Plaintiff's complaint must be dismissed.

DECREE NISI

And now, November 10, 1977, plaintiff's complaint is dismissed.

If no exceptions are filed within ten days after notice of filing of this adjudication a final decree shall be entered by the Prothonotary on praecipe.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU
and DELLA BECKER

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal having been improvidently granted, the same is hereby dismissed.

By THE COURT:

/s/ MARLENE F. LACHMAN
Marlene F. Lachman, Esq.
Prothonotary

Dated: May 19, 1982

STATUTES INVOLVED

72 P.S. § 5860.602 Notice of sale

Prior to any scheduled sale the bureau shall give notice thereof, once a week for three (3) consecutive weeks in two (2) newspapers of general circulation in the county, if so many are published therein, and once in the legal journal, if any, designated by the court for the publication of legal notices. Such notice shall set forth (a) the purposes of such sale, (b) the time of such sale, (c) the place of such sale, (d) the terms of the sale including the approximate upset price, (e) the descriptions of the properties to be sold as stated in the claims entered, each description commencing with

"
.....
Name of Owner

.....
description"

Where the owner is unknown and has been unknown for a period of not less than ten years, the name of the owner need not be included in such description.

The description may be given in intelligible abbreviations.

Such published notice shall be addressed to the "owners of properties described in this notice and to all persons having tax liens, tax judgments or municipal claims against such properties".

In addition to such publications, similar notice of the sale shall also be given by the bureau, at least ten (10) days before the date of the sale, by United States registered mail, personal addressee only, return receipt re-

quested, postage prepaid, to each owner as defined by this act [1] and by posting on the property.

The published notice, the mail notice and the posted notice shall each state that the sale of any property may, at the option of the bureau, be stayed if the owner thereof or any lien creditor of the owner on or before the date of sale enters into an agreement with the bureau to pay the taxes in instalments, in the manner provided by this act, and the agreement entered into.

In case the property of any corporation, limited partnership or joint-stock association is advertised for sale, the bureau shall give to the Department of Revenue the notice required by section one thousand four hundred two of the Fiscal Code of the ninth day of April, one thousand nine hundred twenty-nine (Pamphlet Laws 343).[2]

No sale shall be defeated and no title to property sold shall be invalidated because of proof that mail notice as herein required was not received by the owner, provided such notice was given as prescribed by this section.

72 P.S. § 5860.609 Certain liens divested by sale

Every such sale shall discharge the lien of every obligation, claim, lien or estate with which said property may have or shall become charged, or for which it may become liable, except no such sale shall discharge the lien of any ground rent or mortgage which shall have been recorded before such taxes became liens, and which is or shall be prior to all other liens, except other mortgages and ground rents. 1947, July 7, P.L. 1368, art. VI, § 609.

1. Section 5860.101 et seq. of this title.

2. Section 1 et seq. of this title.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 461 January Term, 1979

FIRST PENNSYLVANIA BANK, N.A.,
Appellant

v.

LANCASTER COUNTY TAX CLAIM BUREAU,
Appellee

and

DELLA BECKER,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 6, 1982)

Notice is hereby given that First Pennsylvania Bank, N.A., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, (entered May 19, 1982) dismissing plaintiff's appeal as having been improvidently granted, thereby sustaining the validity of the trial court's decision that the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended*, 72 P.S. § 5860.101 *et seq.*, on its face and as applied to appellant herein complied with the Fifth and Fourteenth Amendments to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

WHITE AND WILLIAMS

Attorneys for Appellant,
First Pennsylvania Bank, N.A.

By /s/ RICHARD M. SHUSTERMAN
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Philadelphia, PA 19107
(215) 854-7078

IN THE
COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW

No. 361 October, 1979, A.D.
No. 800 October, 1979, J.D.

RE: UPSET SALE, TAX CLAIM BUREAU OF BERKS COUNTY, PENNSYLVANIA, HELD ON SEPTEMBER 10 and 11, 1979—OBJECTIONS AND EXCEPTIONS OF ESTATE OF MARY C. SCHUMO, DECEASED.

Clinton J. Najarian, Esquire, and C. Thomas Work, Esquire, for Objectant/Exceptant

James A. Cunningham, Esquire, for Respondents

Argued before Eshelman, P.J. and Schaeffer, J., on September 2, 1980.

OPINION

SCHAEFFER, *J.* July 16, 1982.

On September 10, 1979, the Berks County Tax Claim Bureau sold property of Annabella D. Mosser [1] at public auction pursuant to the Real Estate Tax Sale Law.[2] Roland S. Nolf and Louella V. Nolf, his wife, were the successful

1. The property is located in Robeson Township, Berks County, Pennsylvania, and is more fully described in Deed Book Volume 1699, at page 573, etc.

2. Act of July 7, 1947, P.L. 1368, No. 542, as amended; 72 P.S. 5860, 101 et seq.

purchasers at the sale, bidding the upset price of $3,378.56.[3]

On October 31, 1979, the Tax Claim Bureau filed its consolidated return for the tax sales of September 10 and 11, 1979, including the sale of the Mosser property. On the same day, the Berks County Court of Common Pleas entered a decree nisi confirming these sales, again including the sale of the Mosser property.

At the time of the September 10, 1979 sale, the Estate of Mary C. Schumo was a judgment creditor of Annabella D. Mosser holding several judgment liens against the property sold at tax sale.

On November 14, 1979, the Schumo Estate filed objections and exceptions to the September 10th sale of the Mosser property and caused a rule to be issued upon the Tax Claim Bureau, the Nolfs, and Annabella D. Mosser, to show cause why the tax sale of the property should not be invalidated, set aside and rescinded. The rule was returnable January 7, 1980 and was extended to January 17, 1980.

On January 17, 1980, Annabella D. Mosser consented to the Schumo request and, accordingly, the court entered an order making the rule absolute as to her only.

The Schumo Estate alleged, *inter alia*, in its objections and exceptions that it had not received notice, either written or oral, prior to the September 10, 1979 sale, and that, therefore, the sale was invalid as to the Estate.

On August 1, 1980, the Schumo Estate filed a motion for summary judgment, which motion is now before us.[4]

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3. Deposition of Thomas Rose, May 2, 1980, page 6.

4. Strictly speaking, Pa. R.C.P. 1035 relating to Summary Judgment does not apply to this proceeding. The Rule is applicable only to Assumpsit actions and to such other actions which apply the Assumpsit Rules by reference. The present action is under the Real Estate Tax Sale Act and the procedures under that

The record in the case at bar is clear that the Tax Claim Bureau did not give the Schumo Estate any direct notice of the tax sale whatsoever. Furthermore, there is no evidence that the Estate had actual notice of the sale. However, the Tax Claim Bureau did advertise the tax sale in the Reading Eagle and Reading Times on August 18, 25 and September 1, 1979. The same notice was also advertised in the Berks County Law Journal on August 30, 1979, in accordance with the requirements of section 602 of the Real Estate Tax Sale Law.[5] The advertisement was addressed to the "Owners of properties described in this notice and to all persons having *tax* liens, *tax* judgments, or *municipal* claims against such properties." (Emphasis supplied)

This published notice was the only notice which the Tax Claim Bureau gave or, under the Real Estate Tax Sale Law, was required to give.

The Schumo Estate does not dispute that the sale was held in accordance with the applicable law. Rather, it argues that the Real Estate Tax Sale Law is unconstitutional insofar as it deprives lien creditors of notice, and thus deprives them of a valuable property right, i.e., their liens, without due process of law. We agree.

Before tackling this issue directly, a brief historical review of the applicable law is enlightening. Prior to the

4. (Cont'd.)

Act are not governed by the Assumpsit Rules. Rather, the Act, itself, in section 607, 72 P.S. 5860.607, provides that objections or exceptions shall be "disposed of according to the practice of the court." The Berks County Court of Common Pleas has no local rule providing for the handling of objections or exceptions to a decree *nisi* in a case of this kind. However, we find it appropriate to consider this case on the record before us, including the deposition taken, as this is in accordance with the practice of our court.

5. Act of July 7, 1947, P.L. 1368, Art. VI, Section 602, as amended; 72 P.S. 5860.602.

adoption of the Real Estate Tax Claim Law, delinquent tax claims could be enforced pursuant to the provisions of the Act of May 16, 1923.[6]

This prior law provided for an upset sale similar in many respects to the upset sale authorized by Section 602 of the Real Estate Tax Claim Act of 1947, but significantly different in one important aspect. The Act of 1923 provided that advertisement of the sale should be made by the sheriff addressed to persons having tax liens, tax judgments or municipal claims, as in other real estate sales by the sheriff, which meant that a non-municipal claim lien creditor received no notice of the sale. However, under the Act of 1923, a purchaser at an upset sale acquired the property subject to all liens, including mortgage and judgment liens, excluding only tax and municipal claims. Therefore, under the Act of 1923, a private judgment creditor did not have his lien affected by a tax upset sale, the upset sale could not deprive him of a property right and, therefore, no notice to him was required.

Significantly, the Real Estate Tax Sale Law of 1947 provided that the upset sale shall divest the lien of "every obligation, claim, lien or estate with which said property may have or shall become charged or for which it may become liable, except no such sale shall discharge the lien of any ground rental mortgage which shall have been recorded before such taxes became liens and which is or shall be prior to all other liens, excepting other mortgages and ground rents."[7]

Thus, the Real Estate Tax Claim Sale Act of 1947 attempts to divest the lien of a judgment creditor, but provides for no notice addressed to a judgment creditor.

6. Act of May 16, 1923, P.L. 207, Section 1 et seq; 53 P.S. Section 7101, et seq.

7. Act of July 7, 1947, P.L. 1368, Section 609; 72 P.S. 5860.609.

In short, the effect of an upset sale under the Act of 1947 is substantially different than the effect of the upset sale under the Act of 1923, but the notice requirements are basically the same.

It is fundamental to the law of this Commonwealth and of the United States that no man's property can be taken from him without due process of law. A judgment lien is a valuable property right. In re *Pennsylvania Central Brewing Co.*, 114 F. 2d 1010, 1013 (3rd Cir. Ct. of Appeals, 1940). As such it can not be taken or destroyed without due process of law. Due process of law inherently requires that a person be given notice of any proceeding that would take from him his property and give him an opportunity to defend or take such other steps as he may deem proper to preserve and protect his property.

The Supreme Court of the United States in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 Sup. Ct. 652, 94 L. Ed. 865 (1950) has set down certain general principles regarding the sufficiency of notice. Mr. Justice Jackson, speaking for the court, said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted) The notice must be of such nature as reasonably to convey the required information." (Citations omitted)

The Appellate Courts of Pennsylvania have interpreted *Mullane* to require that before there can be a deprivation of property rights, notice must be "reasonable under the circumstances." *Hess v. Westerwick*, 366 Pa. 90, 97; 76 A.2d 745, 748 (1950); *Pagni v. Commonwealth*, 179 Pa. Super. 213, 218; 116 A.2d 294, 296 (1955).

The notice given in the present case was not directed or addressed to the person whose rights were affected. An alert judgment creditor who followed every legal notice published would have had no cause to read the notice here given. We find it was not reasonable under the circumstances. Cf. *Commonwealth v. DePofi*, 362 Pa. 229, 66 A.2d 649 (1949).

Therefore, while notice given by publication only may meet minimal due process requirements when addressed correctly, publication of notice addressed to persons other than the Schumo Estate did not give the Schumo Estate adequate notice of the upset sale.

We say this being aware of the case of *1st Pennsylvania Bank v. Lancaster County Tax Claim Bureau*, 66 Lancaster L.R. 247 (C.P. of Lancaster Co., Pa. 1977) in which the Lancaster County Court held a notice identical in its address, wording, and manner of publication to the notice in the case at bar, sufficient as to a non-tax, non-municipal lien creditor. A reading of that case, however, shows that the Lancaster Court held notice by publication in a situation of the type in the case at bar sufficient. The Lancaster Court did not discuss or consider the adequacy of the address set forth in the notice nor whether the address was sufficient to alert the lien holder and impose upon it the duty to read the notice in full. Therefore, while the Lancaster County Court held the notice good as to a non-tax, non-municipal lien holder, it did not address the issue presented to us in the case at bar.

The Commonwealth Court affirmed the Lancaster County decision in a brief opinion. *1st Pennsylvania Bank v. Lancaster County Tax Claim Bureau*, 44 Pa. Commonwealth Ct. 301, 404 A.2d 709 (1979), again without considering the issue presented in the case at bar. Finally, the Supreme Court dismissed an appeal to it from the Commonwealth Court as improvidently granted, again without addressing the issue before us.

We are of the Opinion that *1st Pennsylvania* was decided on other grounds by the appellate courts, that the issue before us has not been ruled on by them, and that we are not governed by *1st Pennsylvania, supra,* in the circumstances presented.[8]

Accordingly, we enter the following order:

ORDER

AND NOW, TO WIT: This 16th day of July, 1982, the rule issued by this court on November 14, 1979 is made absolute, the tax sale of the property of Annabella D. Mosser held on September 10, 1979, to No. 43-74 is adjudicated, invalid and is set aside, and the liens of the Estate of Mary C. Schumo, deceased, on said property remain unaffected by said tax sale.

By THE COURT:

/s/ PAUL H. SCHAEFFER, *J.*

8. The parties entered into a stipulation requesting us to withhold our decision until after the Supreme Court has acted in *1st Pennsylvania,* in the hope that the Supreme Court in its decision in that case would consider the issue before us in the case at bar. Accordingly, we withheld our opinion in this matter until the Supreme Court had acted.